U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: JUN 2 6 2013

Office: NEBRASKA SERVICE CENTER

FILE [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was summarily dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion to reopen. The motion to reopen will be dismissed. The AAO's decision will be affirmed.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reopen be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). The motion was timely filed.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

The matter sought to be reopened is the AAO decision dated December 8, 2012. The AAO summarily dismissed the appeal because the petitioner failed to specifically identify any erroneous conclusion of law or statement of fact for the appeal.[2] The AAO noted that the director denied the petition because the petitioner failed to submit sufficient evidence establishing that it has the continuing ability to pay the proffered wage beginning on the priority date of August 10, 2010[3] and that the beneficiary has obtained the required experience prior to the priority date.[4]

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[1]The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

[2] *See* 8 C.F.R. § 103.3(a)(1)(v).

[3] The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In support of the motion, the petitioner submits its 2010 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, the beneficiary's Bachelor of Science in Business Administration degree issued by , and the beneficiary's transcripts from .

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. The evidence submitted on motion is not new evidence of the petitioner's ability to pay the proffered wage. Further, it is not new evidence of the beneficiary's work experience.[5] The evidence submitted on motion was previously available at the time the director issued its request for evidence on June 29, 2011.[6] It was also available when the petitioner submitted its appeal on October 17, 2011. Thus, the evidence submitted on motion could have been discovered or presented earlier in the proceeding.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the United States Department of Labor (DOL). *See* 8 C.F.R. § 204.5(d).

[4] In the instant case, the labor certification states that the offered position of network and computer system administrator has the following minimum requirements:

H.4. Education: Bachelor's degree in Computer Science.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: Computer Applications.
H.8. Alternate combination of education and experience: Master's degree and two years of experience in the job offered.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1).

[5] The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The petitioner did not submit any evidence of the beneficiary's prior work experience.

[6] The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner failed to provide a copy of its 2010 annual report, U.S. tax return or audited financial statement, and failed to submit evidence that the beneficiary obtained the required experience prior to the priority date. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Therefore, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen. The motion to reopen will be dismissed.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion to reopen will be dismissed. The proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen is dismissed. The AAO's decision dated December 8, 2012 is affirmed. The petition remains denied.